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No. -OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

EASTERN ENTERPRISES,
PETITIONER,

v.

SHIRLEY S. CHATER,
COMM'R OF SOCIAL SECURITY, *et al.*,
RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does retroactive liability for retiree health benefits under the Coal Act violate the Due Process Clause, considering the question left open in *Usery v. Turner Elkhorn,* where Eastern's participation in the coal industry from 1947 to 1965 did not contribute to the financial crisis that prompted Congress to enact the statute in 1992?

2. Does the Coal Act violate the Takings Clause by upsetting Eastern's investment-backed expectations and by imposing a liability out of all proportion to Eastern's "experience" between 1947 and 1965 with retiree benefit plans for coal miners?

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Eastern Enterprises states that it is a Massachusetts business trust, that it has no parent company, and that its only non-wholly owned subsidiary is *All*Energy Marketing Company, L.L.C., in which Eastern owns a fifty percent interest through a joint venture with New England Electric System.

LIST OF PARTIES

The plaintiff to the proceedings below was the petitioner Eastern Enterprises. The defendants to the proceedings below were the respondents Shirley S. Chater in her capacity as Commissioner of the Social Security Administration, the United Mine Workers of America Combined Benefit Fund, and the Trustees of the United Mine Workers of America Combined Benefit Fund. The third-party defendants to the action below were the respondents Peabody Holding Co., Inc., Coal Properties Corp., and Eastern Associated Coal Corp.

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The petitioner Eastern Enterprises respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on April 7, 1997.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 110 F.3d 150 (1st Cir. 1997), and is reprinted in the Appendix hereto, p. A-1, *infra*.

The Judgment and Order of United States District Court for the District of Massachusetts (Wolf, D.J.) have not been reported and are reprinted in the Appendix hereto, p. A-24 and A-25, *infra*, respectively. The Memorandum and Order of United States District Court for the District of Massachusetts (Wolf, D.J.) is reported at 942 F. Supp. 684 (D. Mass. 1996), and is reprinted in the Appendix hereto, p. A-28, *infra*.

Jurisdiction

The judgment for the United States Court of Appeals of the First Circuit was entered on April 7, 1997. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment of the United States Constitution provides: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Coal Industry Retiree Health Benefit Act of 1992 is codified at 26 U.S.C. §§ 9701-22 and selective portions are reproduced in the Appendix hereto, A-39.

Statement of the Case

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 ("Coal Act") as applied to Eastern Enterprises ("Eastern"). Under the Coal Act, Eastern has been assigned responsibility to pay premiums for lifetime health benefits for more than 1,400 former employees (or their dependents), all of whom worked for Eastern before 1966. As a result, Eastern faces a liability actuarially projected to be more than $100 million. *See* JA 145.[1]

On November 1, 1993, Petitioner Eastern filed suit against the Respondents Social Security Administration ("SSA"), the United Mine Workers of America Combined Benefit Fund ("Combined Fund"), and the Combined Fund's trustees, claiming that the Coal Act, as applied to Eastern, violates substantive due process and constitutes an uncompensated taking of Eastern's property (the "Constitutional Claims"), both in violation of the Fifth Amendment.[2] As explained below, the district court and the

[1] The joint record appendix from the United States Court of Appeals for the First Circuit is referred to as "JA."

[2] Eastern also amended its complaint to contend that the beneficiaries assigned to Eastern by SSA should have been assigned to the successor to Eastern's coal business, Eastern Associated Coal Corp. ("EACC"). Eastern also filed a third-party complaint against EACC and its controlling shareholders, Peabody Holding Co., Inc. and Coal Properties Corp., for indemnification for any liability Eastern may have under the Coal Act.

court of appeals each upheld the application of the statute to Eastern.

Set forth below are the relevant facts regarding the history of the United Mine Workers of America's ("UMWA") various coal industry retiree health benefit plans, the development and operation of the Coal Act, and Eastern's relationship to both.

A. *The UMWA Funds*

In 1946, following a strike in the coal industry, President Truman issued an Executive Order directing the Secretary of the Interior to take possession of the coal mines and to negotiate appropriate changes in the terms and conditions of employment with the UMWA. The Secretary and the UMWA created a multiemployer welfare and retirement fund to provide miners with health benefits to be funded through payroll deductions. In 1947, following the return of control of the mines to the mine operators, the UMWA and the Bituminous Coal Operators Association ("BCOA") negotiated the first National Bituminous Coal Wage Agreement ("NBCWA"). The 1947 NBCWA created a new multiemployer union welfare trust, the W&R Fund, to which signatory employers were required to pay a royalty for every ton of coal produced or sold. The 1947 NBCWA did not require the W&R Fund to pay any specific benefits to miners; it merely authorized the fund trustees to determine the benefits to be provided. The W&R Fund was managed on a "pay as you go basis" under which benefits were

provided directly from tonnage royalty payments.[3] *See* JA 126-27.

In 1950, a new multiemployer fund was established, the UMWA Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"). From 1950 to 1974, the terms and structure of the 1950 W&R Fund remained essentially unchanged. Coal operators made set contributions to the Fund only during the effective period of the NBCWA they signed; they were not required to provide, let alone guarantee, any benefit levels. Indeed, beneficiaries of the plan were specifically told that benefits were revocable and not vested, *see* JA 129-130, and the Fund trustees frequently exercised their authority to revise eligibility requirements for benefits and to alter, rescind, or reduce particular benefits, *see* JA 128-132.

In 1974, in response to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, the BCOA and the UMWA entered into a new NBCWA that differed substantially from previous agreements. The 1974 NBCWA created four new trusts as successors to the 1950 W&R Fund, two of which were benefit plans: the 1950 Benefit Plan, which provided health benefits for pre-1976 retirees, and the 1974 Benefit Plan, which provided health benefits to miners who retired in 1976 or thereafter (the "1974 Benefit Plan"). Most important, under the 1974 NBCWA, the Fund was required for the first time to provide certain lifetime health benefits to miners. *See* JA 133-34.

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[3] The operator-appointed trustee unsuccessfully challenged the UMWA-selected "pay as you go" methodology for the original fund on the grounds that such a system was inherently flawed and prone to financial difficulties. *See Van Horn* v. *Lewis*, 79 F. Supp. 541 (D.D.C. 1948).

In 1978, the BCOA and the UMWA entered into another new NBCWA designed to restructure the industry's health care system. The financial stability of the Funds had begun to deteriorate in the late 1970s, due principally to the withdrawal of large numbers of employers from participation in the NBCWAs; many left the coal business and others signed non-UMWA agreements. *See* JA 137-138; Staff of House Comm. on Ways & Means, 104th Cong., 1st Sess., Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992, at 67 (Comm. Print) ("1995 W&M Report"). As a result, the 1978 NBCWA was the first to contain the "guarantee clause," which essentially obligated signatory operators to make higher contributions to the Funds if and when necessary to guarantee sufficient funding for medical costs. The 1978 NBCWA continued the multiemployer approach for those retiring before 1976, but it provided that persons retiring on or after January 1, 1976, would receive their health benefits from single-employer plans maintained by the retirees' last NBCWA signatory employer. *See* JA 136-137. Subsequent NBCWAs signed in 1981, 1984, and 1988 also explicitly guaranteed lifetime health benefits to all coal industry retirees. *See id.*

B. *Eastern Enterprises*

Eastern (known before 1989 as "Eastern Gas and Fuel Associates") was created in 1929 as a Massachusetts business trust. From 1946 to 1965, Eastern was involved in the coal business through its Coal Division, which operated a number of mines primarily in Pennsylvania and West Virginia. During that time, Eastern employed miners associated with the UMWA and signed NBCWAs that required Eastern to contribute to the 1950 W&R Fund. Eastern made all mandated contributions under those NBCWAs, which the Combined Fund concedes exceeded $60

million, and otherwise satisfied all of its contractual obligations to the Fund and to its employees. *See* JA 2626.

In 1963, Eastern transferred all of its coal-related operations to its newly created subsidiary, EACC. As a Massachusetts business trust, Eastern knew that its shareholders could be liable for unsatisfied debts of the trust. In order to attract capital, it was necessary therefore that Eastern confine operational liabilities to its subsidiaries. *See* JA 214-15. Eastern had transferred all of its coal-related assets to EACC by the end of 1965, and Eastern's Coal Division then ceased to exist. All coal-related liabilities, known and unknown, became the responsibility of EACC. *See* JA 201, 203, 209, 214, 263.[4]

Following completion of the transfer, EACC repeatedly represented to the world, in filings with the Securities and Exchange Commission and in other contexts, that it was the "successor" to Eastern's Coal Division. *See* JA 264, 265, 277-78, 338-572. EACC's conduct mirrored those representations. EACC was operated by the management of the former Coal Division, and continued to operate the same mines, and to employ the same miners as had the Coal Division. Moreover, EACC took over Eastern's contracts with the UMWA, and replaced Eastern as a member of the BCOA, the organization that negotiated with the UMWA, *see* JA 211-12. Beginning in 1966, EACC, not Eastern, proceeded to negotiate and to sign the various

[4] Neither SSA nor the Combined Fund submitted affidavits or sought discovery concerning EACC's succession to Eastern's coal-related assets and liabilities. *Compare* JA 115-23 *with* JA 1879-82, 2329. While Peabody did attempt to contest certain facts related to that issue, *see* JA 2106-20, neither court below addressed these apparent factual disputes, nor did either decide whether Peabody has standing to raise them in this action.

NBCWAs, including the 1974 and subsequent agreements that guaranteed lifetime benefits to all eligible miners and dependents (including former employees of Eastern).

In 1987, Eastern sold EACC to Peabody Holding Co. Because of the structure of the transaction (in which Peabody purchased all of the stock of EACC's sole shareholder), all of EACC's liabilities (including any assumed from Eastern in 1966) remained with EACC. *See* JA 216-17. The price Eastern received for EACC took into account the fact that all coal-related liabilities (known and unknown) would remain with EACC. *See id.*

C. *The Coal Act*

During the 1980s, the problems that had led to the 1978 restructuring of the UMWA multiemployer health care system became more acute and threatened the 1950 and 1974 Benefit Plans' ability to continue providing health benefits to their beneficiaries. *See* 1995 W&M Report, *supra*, at 67. A significant number of signatory operators either left the coal business entirely or shifted to non-UMWA miners and then ceased to pay premiums to the UMWA benefit plans (the so-called "dumping" or "abandoning" of retirees). As late as 1981, the BCOA had 130 member companies, but by 1984 the number had dropped to 30, and by 1992 it had dropped to 15. The UMWA plans were forced to provide benefits for a growing number of retirees from a shrinking premium base. As the Funds approached insolvency, the remaining signatory operators and the UMWA sought congressional intervention. *See* JA 1479-81.

In 1990, Secretary of Labor Elizabeth Dole established a special commission, the Advisory Commission on Mine Workers Retiree Health Benefits (the "Coal

Commission"), to study the retiree health benefit crisis. The Coal Commission identified three developments which, in combination, had left the Funds in a financial crisis. *See* JA 1333. First, the Coal Commission found that the number of coal companies making contributions to the Funds had declined significantly. Second, it recognized an increase in the cost of health care between 1950 and 1990. Finally, it noted the increase in the number of orphaned retirees whose employers had either gone out of business or no longer provided health care benefits. The Coal Commission proposed two alternative funding solutions: an industry-wide funding plan taxing all current coal operators and a more limited arrangement funded by present and former NBCWA signatories, but only reaching as far back as signatories to the 1978 NBCWA which first guaranteed lifetime benefits. *See* JA 139-140.

In light of the Commission's recommendations, Congress considered a series of solutions designed to ensure that the promises of health benefits to current retirees under the 1978 and later NBCWAs would be honored. None of these solutions, however, mandated contributions by pre-1978 NBCWA signatories. *See* JA 140. It was only as a result of a Senate floor amendment to one such proposal, added without any hearing or debate, that Congress extended Coal Act liability to every coal operator that had ever signed *any* NBCWA. *See* JA 1774. The Coal Act codifies lifetime benefits promised in the 1988 NBCWA. *See* 1995 W&M Report, *supra*, at 114. The Combined Fund was created by the statutory merger of the 1950 and 1974 Benefit Plans to provide health benefits to beneficiaries who were receiving benefits from those Plans as of July 20, 1992. *See* 26 U.S.C. §§ 9702(a), 9703(f).

To finance the Combined Fund, the Coal Act requires the assignment of the Fund's beneficiaries to companies that are "in business, . . . whether or not in the coal industry." *Id.* § 9701(c)(7). The Coal Act assignments are based on a three-tiered hierarchy. A beneficiary is to be assigned, first, to the signatory operator that both signed the 1978 NBCWA and most recently employed the beneficiary for two years. If no such entity remains in business, the beneficiary is assigned to the signatory operator that both signed the 1978 NBCWA and most recently employed the beneficiary for any length of time. Finally, if no entity remains in business that meets either description, the beneficiary is assigned to the signatory operator that employed the beneficiary "for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement." *Id.* § 9706(a). Combined Fund beneficiaries for whom no assignment can be made under this hierarchy are deemed to be unassigned beneficiaries. Once the assignments are made, the Coal Act assesses each signatory operator annual health benefit and death benefit premiums based on the number of former employees (and their dependents and survivors) assigned to it, and assesses an additional annual premium equal to each operator's pro rata share of unassigned beneficiaries. *See id.* § 9704(a)-(d).

D. *The District Court Judgments*

Petitioner commenced this action seeking a judgment declaring the Coal Act unconstitutional as applied and later added a count challenging SSA's statutory interpretation of the Coal Act. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a). On February 1, 1996, the District Court denied Eastern's motion for summary judgment on its Statutory Claim and filed a Memorandum and Order on March 30, 1996. *See* A-28. The District

Court, by Order dated June 29, 1996, also denied Eastern's motion for summary judgment and allowed defendants' cross-motions on the Constitutional Claims, stating that it found persuasive the reasoning of several Circuit Courts that had addressed the constitutionality of the Coal Act. *See* A-26. The District Court then entered an Amended Judgment in favor of defendants on both the Statutory and Constitutional Claims on July 24, 1996. *See* A-25.

E. *The Court of Appeals Decision*

The United States Court of Appeals for the First Circuit affirmed the District Court's findings. The Court of Appeals first addressed petitioner's substantive due process challenge. The court held that Congress' purpose in enacting the Coal Act—to ensure that multiemployer coal retiree benefit plans were adequately funded—was legitimate. Denying Eastern's substantive due process challenge, the court concluded that because Eastern had contributed implicitly to miners' expectations of lifetime health benefits, Congress had acted rationally in requiring Eastern to pay for those benefits. The court failed to consider, however, the lack of any connection between Eastern's conduct and the financial crisis that caused Congress to enact the Coal Act's sweeping retroactive liability scheme.

The First Circuit then turned to Eastern's Takings Clause challenge. Noting that "it would be surprising" to discover a taking violation where no due process violation exists, the court conducted a brief, ad hoc inquiry into the nature of the economic deprivation at issue and found that Eastern had not suffered a compensable taking in violation of the Fifth Amendment. This conclusion was reached without regard to the absence of any contribution by Eastern to the financial shortfall that prompted Congress to enact the Coal

Act, or the upset to Eastern's expectations resulting from a liability imposed a generation after Eastern left the coal business.

F. *Other Coal Act Decisions*

Several other courts of appeal have considered whether the Coal Act violates the Due Process and Takings Clauses, three of which have led to petitions for writs of certiorari that his Court has denied. *See Blue Diamond Coal Co.* v. *Secretary of Health and Human Services (In re Blue Diamond Coal Co.)*, 79 F.3d 516, 520 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Davon, Inc.* v. *Shalala*, 75 F.3d 1114, 1119-20 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Co.* v. *Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 484 (2d Cir.), *cert. denied*, 116 S.Ct. 298 (1995). None of the petitions for writs of certiorari to any of the other courts of appeal, however, have involved a situation similar to Eastern's. In each of these other cases, the companies challenging the Coal Act left the coal industry without making any provision for continued contributions to the UMWA Benefit Funds. *See Blue Diamond*, 79 F.3d at 520; *Davon*, 75 F.3d at 1119-20; *LTV*, 53 F.3d at 484. The companies thus orphaned their retirees and directly contributed to the funding crisis that necessitated the Coal Act. *See also Holland* v. *Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Lindsey Coal Mining Co.* v. *Chater*, 90 F.3d 688 (3d Cir. 1996).

Reasons for Granting the Writ

I. THIS CASE PRESENTS THIS COURT WITH AN OPPORTUNITY TO RESOLVE AN OPEN CONSTITUTIONAL QUESTION REGARDING THE LIMITS ON RETROACTIVE COST-SPREADING LEGISLATION.

The petitioner urges this Court to grant its petition for a writ of certiorari because it provides this Court with an opportunity to address an important, open question regarding the outer bounds of retroactive cost-spreading legislation left unresolved in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24, 26-27 (1976), and in subsequent cases. *See Concrete Pipe & Products* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 647-49 (1993) (O'Connor, J., concurring); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 228-29 (1986) (O'Connor, J., concurring). The Coal Act burdens Eastern, a participant in the coal industry between 1950 and 1965, with costs arising from "causes other than [Eastern's] conduct." *Turner Elkhorn*, 428 U.S. at 25-26. This Court has not yet addressed the constitutionality of this "difficult problem" under the Fifth Amendment. *Id.* at 26-27.

A. *An Open Constitutional Question Exists*

This Court established the basic standard for review of retroactive economic legislation in *Turner Elkhorn* and subsequent decisions. "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Id.* at 17. As this Court said in *Gray*, "the retroactive application of the legislation" must "itself [be] justified by a rational legislative purpose." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). However, the Court has not explored the precise dimensions of rationality review in the context of retroactive cost-spreading legislation.

In *Turner Elkhorn*, several coal mine operators challenged the facial constitutionality of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972 (the "Act"), which required coal operators to provide benefits to former miners suffering from pneumoconiosis (so-called "black lung disease"). *See* 428 U.S. at 8-9. The operators contended that requiring the payment of benefits for miners who left employment in the industry before the effective date of the Act was arbitrary and irrational because it imposed retroactive liability for completed acts that were legally proper and, at least in part, unknown to be dangerous at the time they were completed. *See id.* at 12, 15. Rejecting this argument, this Court held that the Due Process Clause of the Fifth Amendment posed no bar to "requiring an operator to provide compensation for a former employee's death or disability . . . arising out of employment in its mines," regardless of when the miner left the coal industry. *Id.* at 19-20.

In addressing the constitutionality of a specific portion of the Act, this Court emphasized the importance of a connection between the operator's conduct and the liability imposed by the statute:

> To the extent that the [Act] . . . is viewed as requiring compensation for damages resulting from death *unrelated to the operator's conduct*, its application to employees who terminated their employment before the Act was passed would present difficulties not

> encountered in our prior discussion of retroactivity. . . . The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a "cost" of the operator's business.

428 U.S. at 24-25 (emphasis added). Because the Court then concluded that the requisite connection existed in the case before it, these "difficulties" were preserved for another day. *See id.* at 25-27.

Similarly, in *Concrete Pipe* this Court rejected an as-applied, substantive due process challenge to retroactive withdrawal liability imposed pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). *See* 508 U.S. at 639. The employer in *Concrete Pipe* had withdrawn from a multiemployer pension plan with a ten-year vesting period after participating for three and one-half years. *See id.* at 605, 607, 609-613. The employer argued that it had not employed anyone long enough to earn vested benefits, and thus retroactive imposition of liability for a share of the pension plan's unfunded vested benefits was irrational. *See id.* at 636-37. However, because employees had earned transferable service credits that could be combined with service credits from other employment to obtain vested status, this Court concluded that the employer had directly increased the pension plan's liability. *See id.* at 638. Thus, the employer's retroactive liability was rationally related to its participation in the plan. *See id.*

Justice O'Connor concurred in the *Concrete Pipe* opinion, but wrote separately in part to reiterate a point that she had made in her concurrence to this Court's *Connolly* decision. *See id.* at 647. This Court's "recent cases leave open the possibility that the imposition of retroactive liability

on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee." *Connolly*, 475 U.S. at 229 (O'Connor, J., concurring) (citing *Turner Elkhorn*, 428 U.S. at 19, 24-26, and *Gray*, 467 U.S. at 733).

The "difficult problem" identified in *Turner Elkhorn*, and noted repeatedly since by Justice O'Connor in *Connolly* and *Concrete Pipe*, remains unresolved because the legislation in those prior cases "serve[d] to spread costs in a rational manner—by allocating to the operator an actual cost of his business." *Turner Elkhorn*, 428 U.S. at 24-25. In each instance, the plaintiff made a direct, causal contribution to the economic costs that retroactive legislation later sought to address. *See id.* at 24-25; *Concrete Pipe*, 508 U.S. at 638; *see also United States* v. *Sperry Corp.*, 493 U.S. 52, 64-65 (1989) (retroactive deduction from tribunal award to corporation was rational where the deduction was used to defray the expenses of the tribunal).

Because *Turner Elkhorn* and its progeny each involved cost-spreading to parties directly responsible for the economic conditions that prompted Congress to enact retroactive legislation, this Court has not had an opportunity to consider the strength of the connection to past conduct that is necessary to justify retroactive legislation. For example, is it ever rational to shift current costs of operation to former industry participants without regard to their actual contribution to the economic difficulty that lead to congressional action? If actual contribution is required, does mere historical participation in an industry suffice to justify retroactive cost-shifting of current operations in the absence of a direct "causal" contribution by former participants to current funding shortfalls? If some causal connection is required to justify retroactive cost-

spreading legislation, must the degree of connection be stronger the farther back the retroactive scope of the legislation reaches?

Such questions implicate the broader issue left unresolved in prior decisions as to the reasonable limits on congressional power to impose retroactive liability as a cost-spreading device. *See Turner Elkhorn*, 428 U.S. at 42 (Powell, J. concurring). "[T]he Court has never intimated that Congress possesses unlimited power to 'readjus[t] rights and burdens . . . [and] upse[t] otherwise settled expectations.'" *Connolly*, 475 U.S. at 229 (O'Connor, J., concurring). To the contrary, the strong implication from prior decisions is that such legislation is unconstitutional when it imposes costs on a party whose conduct did not engender the burdens the legislation was designed to address. *See Concrete Pipe*, 508 U.S. at 609; *id.* at 649 (O'Connor, J., concurring); *Sperry*, 493 U.S. at 64-65; *Turner Elkhorn*, 428 U.S. at 17-19; *id.* at 42, 45 n.9 (Powell, J., concurring).

B. *The First Circuit Failed to Conduct the Correct Rational Basis Analysis for Retroactive Cost -Spreading Legislation*

The First Circuit failed to recognize the appropriate contours of rational basis review for retroactive cost-spreading legislation discernable from this Court's prior decisions.[5] As described above, this Court previously has suggested that legislation using retroactive liability as a cost-spreading device is irrational and arbitrary when it imposes

[5] As noted by the First Circuit, there can be little argument that the Coal Act imposes retroactive liability on Eastern, in that it "attaches new legal consequences to events completed before its enactment." A-11 (citing *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

costs on a party whose conduct did not cause the economic burden the act was designed to address. Despite the extensive discussion in Eastern's briefs, the First Circuit ignored this aspect of this Court's Fifth Amendment jurisprudence and found that Eastern's Coal Act liability was rational because Eastern had implicitly created an expectation of lifetime health benefits among the miners it employed[6] and participated in the selection of a predecessor funding mechanism for those benefits that proved inadequate.[7] *See* A-14-15. Because Eastern did not contribute to the expansion of the beneficiary pool or to the decline in the resources of the Funds, the Coal Act burdens Eastern with costs arising from "causes other than . . . [Eastern's] conduct." *Turner Elkhorn*, 428 U.S. at 25-26.[8]

[6] Eastern rejects the view that pre-1974 signatories contributed to expectations of lifetime benefits; the terms of the pre-1974 NBCWAs certainly were to the contrary, and no reasonable person reading them would think that they made any such promise. But even assuming that such expectations became reasonable over the years, as described below, they cannot justify Eastern's retroactive liability under the Coal Act.

[7] It is ironic that the First Circuit mentions Eastern's participation in the selection of a funding mechanism as support for the rationality of Eastern's Coal Act liability. The funding mechanism was in fact forced on the coal operators by the UMWA. *See supra* note 3.

[8] The First Circuit's holding runs counter to this Court's recent reaffirmation of the principle that where its precedent is directly applicable, "yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini* v. *Felton*, __ U.S. __ (June 20, 1997) (No. 96-552) (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). The Supreme Court precedent directly applicable to this case is *Railroad Retirement Board* v. *Alton R.R.*, in which this Court unanimously rejected as violative of Due Process a one-year reach back provision requiring all interstate railroads to contribute to an employee retirement fund whose beneficiaries included employees who "within one year prior to the date of enactment were in the

Congress enacted the Coal Act because the UMWA benefit plans were facing a funding crisis that left the plans unable to provide health benefits. The funding crisis was caused principally by a significant number of signatory operators either leaving the coal business entirely or shifting to non-UMWA miners and then ceasing to pay premiums to the UMWA benefit plans. Eastern, unlike those operators, did not dump or abandon its retirees by ceasing to pay premiums. Rather, Eastern took the prudent step of creating a substitute, a fully capitalized subsidiary, that assumed Eastern's obligations to the UMWA benefit plans and continued to pay premiums up until the enactment of the Coal Act. Unlike *Turner Elkhorn* and *Concrete Pipe*—and unlike all of the Courts of Appeal cases that have upheld the Coal Act under the Due Process Clause—the actions of the party saddled with staggering retroactive liability in this case were not among the catalysts producing the specific harm that the challenged statute was designed to solve.

It is true that Eastern, along with others, including the federal government, participated in the creation of the original UMWA health benefit plan. Yet neither the Coal Commission nor Congress has suggested that the original funding mechanism was inadequate to fund the benefits provided by those plans or any future benefits then "expected" by participants in those plans. It was only beginning in 1974, almost a decade after Eastern's departure from the industry,

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service of any carrier." 295 U.S. 330, 345 (1935). Although it is clearly relevant, the First Circuit chose not to apply *Alton*, stating that "*Alton* . . . is no longer good law." A-16. The First Circuit's refusal to comply with this Court's clear statement on the importance of following directly controlling Supreme Court precedent serves to strengthen the bases for granting Eastern's petition for review.

that successor wage agreements guaranteed lifetime retiree health benefits and significantly enhanced the plans' benefits. It was the failure adequately to fund these guaranteed benefits and to fulfill the *explicit* expectations created by the successor agreements that led Congress to enact the Coal Act.

The "injury" addressed by the Coal Act arose because the UMWA fund was unable to meet its obligations, not because a prior generation of companies may or may not have created certain expectations. Rationally, the mere contribution by an industry member to once modest expectations of certain miners should hardly be sufficient to justify such sweeping retroactive liability; rather, it is the failure to satisfy those expectations that is the determinative factor. Because Eastern, through EACC, maintained its financial commitments to its miners by paying into the benefit funds, Eastern's conduct cannot be said to be a contributing factor to the funding crisis that Congress sought to remedy. Indeed, given the explicit creation of guaranteed benefits after 1974, the need to pay retirees' health benefits would have existed regardless of whether Eastern earlier had made any implicit promises of lifetime benefits.

C. *Review in this Case is Justified by Principles of Fairness, Rationality, and Sound Policy Inherent in the Fifth Amendment*

As this Court recognized in *General Motors Corp.* v. *Romein*, 508 U.S. 181, 191 (1992), retroactive legislation such as the Coal Act:

> presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of

legitimate expectations and upset settled transactions.

Given the absence of any significant causal connection between Eastern's behavior and the funding crisis, the sweeping retroactive liability imposed on Eastern violates this basic norm of fairness.

But the reasons for accepting Eastern's petition go beyond even basic fairness: applying the Coal Act to Eastern would undermine the very goals of good corporate citizenship that Congress itself intended the Coal Act to achieve. As Senator Rockefeller stated in introducing the legislation, the primary "principle at stake" in designing the Coal Act was "keeping commitments." 137 Cong. Rec. S17,061 (daily ed. Nov. 19, 1991) (statement of Sen. Rockefeller). Unlike the operators this Court has encountered in its due process cases, Eastern kept its commitments to its miners by ensuring that its fully capitalized subsidiary, EACC, continued to contribute to the Funds.

Moreover, imposing liability on Eastern for making the "right" choice at every turn—by agreeing to provide benefits in the first place and by providing for the maintenance of those benefits over the long term—creates perverse incentives for members of other industries that would follow in Eastern's footsteps.

And finally, the First Circuit's analysis represents a judicial proclamation of Congress' unchecked power to use retroactive liability as a cost-spreading device. This Court should grant Eastern's petition for certiorari to contain this sweeping precedent, and to declare that Congress' use of retroactive liability as a cost-spreading device is irrational

and arbitrary when it imposes costs on a party whose conduct did not cause the economic burden that the Coal Act was designed to address.

II. THE COAL ACT, AS APPLIED TO EASTERN BY SSA, TAKES EASTERN'S PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT.

Under the Coal Act, Eastern is subject to a staggering assessment that bears only the faintest relationship to Eastern's experience with the UMWA health benefit plans, directly interferes with Eastern's investment-backed expectations, and thus amounts to an uncompensated taking in violation of the Fifth Amendment.

In its decision, the First Circuit erroneously presumed that its finding in the due process context all but necessitated its conclusion of an uncompensable taking. Relying on dicta in *Connolly* suggesting that "it would be surprising" to "discover now" a takings violation where no due process violation had been found in *Gray* or *Turner Elkhorn*, *see Connolly*, 475 U.S. at 223, the First Circuit elevated this Court's case-specific aside to the level of a "warn[ing]" that when substantive due process exists, a finding of an uncompensable taking will almost certainly follow, *see* A-19. The First Circuit's presumption misreads the takings jurisprudence of this Court and raises the unsettled question of the doctrinal relationship between substantive due process and regulatory takings. In addition, the First Circuit's faulty initial premise produced a distorted version of the "ad hoc" standard of review under the Takings Clause, and a result far beyond the limitations on government power established in *Concrete Pipe* and earlier cases. This case therefore presents this Court with an opportunity to refine and extend its takings

jurisprudence, and to correct the gross unfairness produced by the application of the Coal Act to Eastern.

A. *The First Circuit Erroneously Merged the Due Process and Takings Clauses*

Neither precedent nor logic supports the virtually dispositive weight placed by the First Circuit on its due process analysis in assessing whether Coal Act liability results in a taking as to Eastern. Apart from the case-specific comment in *Connolly*, this Court has left unclear the nature of the relation it might find between the doctrines of takings and of substantive due process in assessing the constitutionality of retroactive legislation.[9] Both issues may certainly arise in challenges to economic legislation, and neither is proven merely by showing that "legislation requires one person to use his or her assets for the benefit of another." *Connolly*, 475 U.S. at 223. However, neither in *Connolly* nor in *Concrete Pipe* does the Court suggest, much less "warn," that the constitutional analysis under one doctrine should necessarily inform the analysis of the other.

Both in their textual separation in the Constitution and as elucidated by the Court, the takings and due process doctrines each retain distinct meaning and require analysis under independent standards of review. *See Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987) ("[T]here is no reason to believe . . . [that] the standards for takings challenges, due process challenges, and equal

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[9] Numerous scholars have noted the confusion between the Due Process and Takings Clauses in an economic context. *See, e.g.*, Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607 n.40 (1988); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1081 (1980).

protection challenges are identical . . . ."). Moreover, as detailed below, the established ad hoc takings analysis reiterated in *Connolly* is, on its face, substantively different from the due process standard of rationality review. To suggest that where due process is satisfied, one is presumptively unlikely to find a takings violation subverts the historical separation of the two doctrines, disregards their logical meaning, and undermines lower courts' ability to apply the takings precedents of the Court.

B. *The First Circuit's Erroneous Application of the Ad Hoc Factors*

No "set formula" exists in Takings Clause cases involving economic legislation; rather, "ad hoc, factual inquiries into the circumstances of each particular case" are appropriate. *E.g.*, *Connolly*, 475 U.S. at 224; *see also Concrete Pipe*, 508 U.S. at 643. The inquiry is case-by-case—and thus the Coal Act may effect a taking as applied to one company, *see, e.g., Unity Real Estate Co.* v. *Hudson*, 889 F. Supp. 818, 835 (W.D. Pa. 1995), but not as applied to another, *see, e.g., LTV Steel Co.* v. *Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 494-96 (2d Cir.), *cert. denied*, 116 S.Ct. 298 (1995). With respect to Eastern, the First Circuit nominally applied the accepted factors, but in a manner that effectively and incorrectly reshaped this Court's takings jurisprudence.

1. *The Investment-Backed Expectations Factor*

The "investment-backed expectations" inquiry in a Takings Clause analysis examines: (1) what the reasonable expectations of the burdened party were or should have been at the time it took the relevant actions, *see, e.g., Concrete*

Pipe, 508 U.S. at 646; *Connolly*, 475 U.S. at 227; and (2) whether previous government involvement in the area undermines the reasonableness of any prior expectation, *see, e.g., Concrete Pipe*, 508 U.S. at 645-46; *Connolly*, 475 U.S. at 226-27. Rather than conducting a probing inquiry on this issue, the First Circuit simply concluded that Eastern had "contributed" to miner expectations in an industry with a "pattern of federal involvement," and therefore "Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation generated." A-20. This indifferent analysis overlooked the necessity for any objective inquiry into Eastern's actual expectations. Moreover, the court fashioned a standard for the "investment expectations" factor that incorrectly assumes that a general history of federal involvement in an industry is sufficient to justify virtually any retroactive liability. *See Concrete Pipe*, 508 U.S. at 649 (O'Connor, J., concurring).

As shown below, when judged from the perspective of 1965, the imposition of a retroactive $100 million liability on Eastern interferes with reasonable investment-backed expectations to an unprecedented degree. When Eastern completed transferring its coal business to EACC in 1965 —a step necessitated by capital raising requirements— Eastern reasonably expected that EACC would stand in the shoes of Eastern for all "financing, liability and operational purposes," including both known and unknown liabilities, and EACC in fact did so for more than 25 years. *See* JA 203, 209.

Additionally, the NBCWAs themselves reflected the expectation that, once each of the contracts had expired, the operator would have no further contribution obligations. Coal operators made set contributions to the Fund only during the effective period of the NBCWA they signed; they were not

required to provide, let alone guarantee, any benefit levels. Indeed, during the time of Eastern's involvement, beneficiaries of the plan were specifically told that benefits were revocable and not vested, *see* JA 129-130, and the Fund trustees frequently exercised their authority to alter, rescind, or reduce particular benefits, *see* JA 128-132.

Moreover, during the entire period between 1947 and 1964 that Eastern was a signatory to the agreements, no existing statute suggested that mere participation in a defined contribution plan would obligate Eastern to continue providing benefits to the same miners (and their beneficiaries) for life. As Justice O'Connor stated in her concurrence in *Concrete Pipe*, 508 U.S. at 649, "[s]urely the employer that joined a multiemployer plan before *ERISA* had been promulgated—before Congress had made employers liable for unfunded benefits—might have a *strong constitutional challenge* to retroactive withdrawal liability." (emphasis added.) It is incorrect to suggest, as does the First Circuit that employers may be subject to retroactive liability simply because they have "long been subject to federal regulation." *Id.* (O'Connor, J. concurring) (internal quotations omitted). While some courts have observed that "federal intervention to avoid instability [in the coal industry] was foreseeable," *Davon*, 75 F.3d at 1129; *see also Blue Diamond*, 79 F.3d at 525, that is a far cry from saying that the Coal Act's liability scheme was foreseeable.[10]

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[10] This conclusion is buttressed by the fact that, while the federal government had indeed taken over coal mines at several points surrounding World War II, those actions often resulted in successful Takings Clause claims by the coal companies. *See. e.g., United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951). Thus, federal intervention may have been foreseeable in 1965 based on past events, but the legal fallout from those events would have led coal companies to expect that they would be compensated for losses caused by such intervention.

Here, then, is the great irony of this case: a company in 1965 that wished to leave the coal business and, in the exercise of impressive foresight, took into account the possibility of rational federal intervention more than 25 years later to enforce its employees' future expectations of lifetime benefits, would have done *exactly* what Eastern did. It would have created a substitute company, fully capitalized that company, transferred all of its coal-related assets and liabilities to that company (including its coal-related employees), and required that company to continue paying the appropriate assessments into the UMWA funds. Because that is precisely what Eastern did, Eastern's expectation as of 1965 that it would not face liability was eminently reasonable, and its situation is thus readily distinguishable from those of other companies to have challenged the Coal Act.

2. *The Economic Proportionality Factor*

As noted above, the impact of the Coal Act on Eastern is currently estimated at $100 million, a severe economic impact by any standard. Of course, the size of the liability alone, however great, does not end the inquiry. For Takings Clause purposes, the question is whether Eastern's liability is "out of proportion to its experience with the plan," *Concrete Pipe*, 508 U.S. at 645 (quoting *Connolly*, 475 U.S. at 226). According to the First Circuit, this prong of the analysis is satisfied because Eastern's liability is calculated in relation to the number of former employees assigned to it. This superficial approach misreads the serious inquiry necessary to satisfy the Takings Clause.

Recent decisions demonstrate that, for the proportionality inquiry to have any meaning, it must consider

the strength of the connection between the property owner and the object of the statute. In both *Connolly* and *Concrete Pipe*, for example, the Supreme Court considered whether the imposition of withdrawal liability under the MPPAA constituted a taking. The MPPAA imposes liability *only* on employers that withdraw from multiemployer plans and *only* to the extent necessary to avoid under funding *caused* by each such withdrawal. Every withdrawing employer therefore is by definition part of the problem the statute was designed to correct; the Court readily concluded that the liability was proportional to the employer's experience with the plan. *See Connolly*, 475 U.S. at 225-26; *Concrete Pipe*, 508 U.S. at 645.[11]

With respect to the Coal Act, other Courts of Appeal have concluded that the relationship between the liability and the number of miners employed by the operator satisfies the "proportionality" standard — not just because of some mathematical formula, but because it "rationally apportions future financial responsibility according to past participation" in the plans. *E.g.*, *LTV*, 53 F.3d at 494. The meaning of "proportionality" was informed by the particular circumstances of each operator. In each instance, the operator had arguably contributed to the crisis in the UMWA funds by leaving the coal business without providing for

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[11] In the context of land use regulation, the Court has noted the constitutional necessity of "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy," *Pennell* v. *City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part). Thus, land use regulations consistent with such a cause-and-effect relationship will be upheld, *see, e.g.*, *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987), while those inconsistent with it may be struck down, *see, e.g.*, *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987).

continued contributions to the funds on behalf of their former employees.

Yet, rather than considering whether Eastern's Coal Act liability is proportional to its "experience" with the old UMWA Funds, *see Connolly*, 475 U.S. at 226, the First Circuit erroneously limited its evaluation of proportionality to the relationship between Eastern's Coal Act liability and the number of miners it once employed. *See* A-20-21. Such an assessment ignores the reality that Eastern, through EACC, fulfilled its own financial commitment to the miners it employed, and did not participate in the creation of the financial crisis that prompted Congress to act. The First Circuit's crabbed vision of takings "proportionality" impaired its ability to analyze this basic fact. There is no proportionality *whatsoever* between Eastern's conduct and the crisis in the UMWA funds that Congress sought to resolve.

3. *The Nature of Governmental Action Factor*

With respect to the third prong of the Takings Clause inquiry —"the nature of the governmental action," *Connolly*, 475 U.S. at 225 — the First Circuit again misunderstood, and therefore did not apply, the correct standard of review. As applied to Eastern, "the character of the Government regulation here is extraordinary." *Hodel* v. *Irving*, 481 U.S. 704, 716 (1987) (finding a taking based principally on the character of the governmental action).[12] In analyzing this

[12] It should be noted that as applied to Eastern, the Coal Act lacks any "average reciprocity of advantage," a feature that "has been recognized as a justification of various laws." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); *cf. Keystone*, 480 U.S. at 491-92. Because Eastern has left the coal business completely, and none of its remaining subsidiaries are coal-related,

prong, however, the First Circuit was satisfied by a superficial analogy between the Coal Act and the MPPAA reviewed by the Court in *Gray*, *Connolly*, and *Concrete Pipe*. Since each statute is a "public program that readjusts economic burdens, and the funds collected are paid to a private benefit fund, not to a government entity," A-22, the First Circuit concluded that this prong of the takings analysis had been satisfied. To satisfy the criteria established by this Court, however, the First Circuit should have addressed the glaring differences between the Coal Act and the MPPAA.

First, there is a vast difference in scope between the Coal Act's period of retroactivity of approximately forty years and the MPPAA's retroactive period of just five months. *See Gray*, 467 U.S. at 730-31 (stating that the Court was "loathe to reject" the "common practice" of "enact[ing] retroactive statutes 'confined to short and limited periods required by the practicalities of producing national legislation . . . .'"). Second, and more important, the MPPAA was designed to solve a particular problem — the underfunding of multiemployer pension plans caused by employer withdrawal — and it does so by imposing liability *only* upon employers who in fact withdraw from such plans, *i.e.*, who are part of the problem the statute seeks to correct. Although the Coal Act's objective is similar — "to restore financial stability and viability to multiemployer benefit plans threatened by employer withdrawals," *LTV*, 53 F.3d at 496 — it carries out its objective by imposing liability on Eastern, a company that was never part of the problem because it *never* abandoned miners or otherwise threatened the stability of the UMWA benefit plans.

Eastern gains nothing at all in exchange for the considerable contribution SSA would have Eastern make to the Combined Fund.

In sum, the First Circuit effectively applied the wrong standard of review to the Takings Clause issue. This Court should grant the petition for certiorari to clarify the relationship between the Due Process and Takings Clauses to establish the limits of Congress' takings authority, and correct the erroneous result reached by the First Circuit.

Conclusion

For all of the forgoing reasons, this petition for certiorari should be granted.

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UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NO. 96-1947

EASTERN ENTERPRISES,
PLAINTIFF, APPELLANT,
V.
SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[HON. MARK L. WOLF, *U.S. District Judge*]

BEFORE SELYA, *Circuit Judge*, CYR, *Senior Circuit Judge*, AND STAHL, *Circuit Judge*.

John T. Montgomery, with whom David C. Kravitz and Ropes & Gray were on brief, for the appellant.
Sushma Soni, with whom Frank W. Hunger, Assistant Attorney General, Donald K. Stern, United States Attorney, and Douglas N. Letter, Attorney, Appellate Staff, Civil Division, Dep't of Justice, were on brief, for the federal appellee.
Peter Buscemi, with whom David Lubitz, Morgan, Lewis & Bockius LLP, John R. Mooney, Elizabeth A. Saindon, Mooney, Green, Baker, Gibson & Saindon, P.C., and David W. Allen, Office of General Counsel, UMWA Health and Retirement Funds, were on brief, for appellees UMWA Combined Benefit Fund and its Trustees.
Kenneth A. Sweder, with whom Howard M. Brown, Thomas M.

Looney, and Stroock & Stroock & Lavan were on brief, for appellees Peabody Holding Co., Eastern Associated Coal Co., and Coal Properties Corp.

April 7, 1997

SELYA, *Circuit Judge*. In this high-stakes appeal, plaintiff-appellant Eastern Enterprises (Eastern) challenges both the Coal Industry Retiree Health Benefit Act, 26 U.S.C. §§ 9701-22 (1994) (the Coal Act), and the interpretation placed upon it by the Social Security Administration (SSA). Eastern claims that the statute, as synthesized by the agency, distorts Congress' intent, offends principles of substantive due process and equal protection, and works an uncompensated taking of a kind proscribed by the Fifth Amendment.

The administrative law argument is new but lacking in merit. The constitutional arguments are retreads which have taken their lumps from courts of appeals in five other circuits. *See Holland* v. *Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Lindsey Coal Mining Co.* v. *Chater*, 90 F.3d 688 (3d Cir. 1996); *Blue Diamond Coal Co.* v. *Secretary of HHS* (*In re Blue Diamond Coal Co.*), 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Davon, Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Co.* v. *Shalala* (*In re Chateaugay Corp.*), 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995). Although these decisions are not binding upon us, we find them convincing. Consequently, we affirm the district court's entry of summary judgment adverse to Eastern.

I. DIGGING THE TUNNEL

While coal may or may not be "a portable climate," Ralph Waldo Emerson, *The Conduct of Life* (1860), the industry has witnessed a series of particularly vitriolic labor disputes over the past half-century. We do not chronicle these disputes in their entirety, but confine ourselves to excavating a few nuggets that are important to a resolution of this appeal.

In 1946, motivated principally by miners' demands for decent health and retirement benefits, the United Mine Workers of America (UMW) called a nationwide strike. To forestall industrial paralysis, President Truman nationalized the coal mines. Following the execution of what came to be known as the Krug-Lewis Agreement, the government relinquished control of the mines. The UMW and the Bituminous Coal Operators' Association (BCOA), a multiemployer group of coal producers, then executed the first National Bituminous Coal Wage Agreement (NBCWA). The 1947 NBCWA specified terms and conditions of employment in the mines and, among other things, extended the Krug-Lewis Agreement by providing a modicum of health and pension benefits to miners.

A new NBCWA, signed in 1950, provided that in exchange for union concessions relative to mechanization of the mines, the BCOA would create a welfare and retirement fund financed by a per-ton levy on coal mined by signatory coal producers. The 1950 Fund was designed to receive employer contributions and use the funds to provide health benefits to current and retired miners (and, in certain cases, to family members).[1] Several subsequent NBCWAs were signed during

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[1] Subsequent references herein to health benefits for miners should be taken to include those situations in which spouses, relatives, and dependents also are eligible for benefits.

the next two decades. None of them altered this basic benefits format.

In 1974, demographic changes and the passage of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, led to a restructuring of the 1950 Fund. In its place, the 1974 NBCWA established four separate multiemployer plans, two covering pension benefits and two dealing with allied benefits. The nonpension entities were the 1950 Benefit Plan, which provided health benefits to coal workers who retired before 1976, and the 1974 Benefit Plan, which covered those who retired on or after January 1, 1976. The 1974 NBCWA explicitly guaranteed lifetime health benefits for enrolled miners. No such express warranty had appeared in any earlier agreement.

In response to continued labor unrest and unresolved concerns over benefits, the 1978 NBCWA incorporated a new provision assuring health care for "orphaned" miners (that is, miners whose employers had abandoned either the coal industry or the UMW), together with complementary "guaranty" and "evergreen" provisions. The net effect of these changes was to obligate signatory coal producers to redeem the promise of lifetime health benefits even after the current pact expired.

Treating the symptoms rather than the cause has never been a very effective method of curing systemic ills. So here: the very economic factors which prompted the remedial measures inserted into the 1974 and 1978 NBCWAs continued to plague the industry. In particular, the cost of health care rose steeply throughout the 1980s, the number of orphaned miners increased dramatically as more and more employers jumped ship, and superannuation swelled the retired miners' ranks. By 1990, contributions from a shrinking number of coal producers proved insufficient to fund the four benefit plans, and those plans were

awash in red ink.

The UMW struck the Pittston Coal Company for nearly 11 months in 1989-90. This work stoppage proved to be the straw that broke the dromedary's back. The Secretary of Labor intervened, brokered a rapprochement, and, as part of the negotiated settlement, set up a commission to study the industry's problems and recommend ways of rejuvenating the benefit plans. The Coal Commission issued its report in late 1990. Congress' response to the commission's suggestions took the form of the Coal Act. The Act folded the 1950 and 1974 Plans into a single UMW-sponsored entity (the Combined Fund) and wove an elaborate tapestry designed to ensure that all retirees who were eligible to receive health benefits from the preexisting Plans would obtain them from the Combined Fund.

The linchpin of the statutory scheme is contained in section 9706 of the Coal Act, which directs the assignment of every eligible beneficiary to a "signatory operator" who is still "in business."[2] The signatory operator (SO) must then pay premiums to the Combined Fund sufficient to defray the estimated annualized health care costs for that beneficiary, as well as an additional amount (proportionate to the number of initial assignments) earmarked to provide coverage for orphaned retirees. *See* 26 U.S.C. § 9704. The assignment hierarchy is administered under the aegis of the SSA. *See id.* at § 9706(a). The hierarchy is structured along the following lines: a retired miner is assigned first, if possible, to an SO which both signed the 1978 (or any subsequent) NBCWA and also employed him for at least two years more recently than any other SO; if no SO

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[2] A signatory operator is statutorily defined as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. § 9701(c)(1). A firm is considered to be "in business" if "such person conducts or derives revenue from any business activity, whether or not in the coal industry." *Id.* at § 9701(c)(7).

fits that description, the retired miner is assigned to the 1978 (or any subsequent) SO which employed him most recently for any length of time; and if there are still no takers (that is, if the retired miner never worked for a 1978 or subsequent SO which is still in business), he is assigned to that SO of any earlier agreement(s) which employed him for the longest period of time. *See id.* at § 9706(a)(1-3). The assignment formula has a safety valve in that the Act preserves the right of any SO which is assigned a miner to seek contribution from other persons in a separate civil action. *See id.* at § 9706(f)(6).

II. MINING THE ORE

The appellant mined coal from 1946 through 1965, and, although it thereafter left the industry, it remains in business as defined by the Act. It is a signatory operator, having executed the 1950 NBCWA and some later pacts (but not the 1974, 1978, or any subsequent NBCWA).

Samuel East dug coal for Eastern from 1946 to 1960 and for two other companies from 1960 to 1967. East (who had retired and was eligible to receive benefits under earlier Plans) was never employed by a signatory to the 1978 (or any more recent) NBCWA. Thus, because Eastern was the SO which had employed East for the longest period of time, the SSA assigned him and his wife to Eastern pursuant to Coal Act § 9706(a)(3).

Displeased by the assignment, Eastern filed suit against the Commissioner of Social Security, the Combined Fund, and the Fund's Trustees. Eastern argued that the Coal Act, as applied to it, crossed the constitutional line at several points. After the denial of Eastern's parallel administrative appeal, in which it argued that Eastern Associated Coal Company (EACC), the wholly-owned subsidiary which took over Eastern's coal

operations in 1966 and which was sold to Peabody Holding Company (Peabody) in 1987, should have been assigned responsibility for the Easts, Eastern amended its complaint to allege a violation of the Administrative Procedure Act, 5 U.S.C. § 706 (1994). Eastern also filed an action against Peabody and EACC seeking indemnification for the liability resulting from the East assignment.[3] Ruling on cross-motions for summary judgment in the principal case, the district court found in favor of the defendants. The proceedings in the third-party action have been stayed pending resolution of this appeal.

III. LIGHTING THE FIRE

Eastern asserts that the administrative assignment decision must be overturned as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Because section 9706(a) is silent on the question of successor liability, Eastern's thesis runs, the law is ambiguous and the SSA ought to have filled the resultant vacuum in such a way as to have dictated assignment of the Easts to EACC.

This novel claim is skillfully presented. Still, innovation is not a certain harbinger of forensic success. The road not taken is oft forsaken for good reason. When agency action is based on the agency's interpretation of a statute entrusted to its care, a reviewing court must undertake a two-step inquiry. *See Chevron U.S.A Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

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[3] It should be noted that the Easts (at least Mrs. East, as Mr. East is now deceased) are a test case. The SSA intends to assign approximately 1400 similarly situated miners and beneficiaries to Eastern.

expressed intent of Congress." *Id.* at 842-43. Only if the statute on which the agency bases its action is "silent or ambiguous with respect to the specific issue" must the court inquire "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

In this instance, the first step of the *Chevron* pavane is fully dispositive. Section 9706(a) of the Coal Act unambiguously delineates a classification regime - and that regime, literally applied, requires East's assignment to the appellant as the pre-1978 signatory which employed him for the longest interval. Moreover, because section 9706(a)(3) speaks of assignment to "*the* signatory operator" (emphasis supplied) which employed the retiree for the greatest period of time, the section by its very terms cannot produce multiple assignments of a single individual.

Eastern's claim that Congress overlooked the possibility of assignment to successors of an SO is unpersuasive. It is a basic principle of statutory construction that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994) (citation omitted). This principle obtains here; at two other points the Coal Act makes explicit reference to successors.[4]

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[4] In defining a "related person to a signatory operator," 26 U.S.C. § 9701(c)(2)(A) provides that "[a] related person shall also include a successor in interest. . . ." Another provision of the Coal Act states in pertinent part:

> If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary . . . to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter.

26 U.S.C. § 9706(b)(2).

Then, too, section 9706(f)(6) provides recourse for those wishing to seek contribution from their successors. We regard this proviso as a patent indication that Congress did not intend to deal with the question of successor liability in section 9706(a).

To sum up, reviewing the language and architecture of the Coal Act as a whole - a permissible inquiry in carrying out the first step of a *Chevron* analysis, see *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) - we think it is obvious that Congress purposely omitted any reference to successors in writing section 9706(a)'s assignment scheme. *See generally Passamaquoddy Tribe* v. *State of Me.*, 75 F.3d 784, 794 n.6 (1st Cir. 1996) (rejecting idea that statutory silence necessarily indicates ambiguity; in an appropriate context, failure to mention an item demonstrates specific congressional intent). Because the Easts were properly assigned by the SSA in pursuance of the plain terms of the Coal Act, we reject the appellant's administrative law argument.

IV. STOKING THE FURNACE

The appellant next asserts that the Coal Act violates its substantive due process rights. We accord plenary review to this challenge, *see*, *e.g.*, *United States* v. *Zorrilla*, 93 F.3d 7, 8 (1st Cir. 1996), mindful, however, that statutes which regulate commercial burdens and benefits are clothed in a formidable presumption of constitutionality. *See Usery* v. *Turner Elkhorn*

Mining Co., 428 U.S. 1, 15 (1976). The strength of this presumption is evinced by the fact that the Supreme Court has not invalidated any piece of purely economic legislation on substantive due process grounds in more than 60 years. Given this mountainous topography, Eastern faces an uphill climb.

The slope is made steeper -- indeed, Sisyphean -- because economic legislation, enacted under Congress' Commerce Clause power, is entitled to the most deferential level of judicial scrutiny. Where, as here, a piece of legislation is purely economic and does not abridge fundamental rights, a challenger must show that the legislature acted "in an arbitrary and irrational way." *Turner Elkhorn*, 428 U.S. at 15. In other words, as long as "the State's objective is legitimate and the taxonomy adopted is rationally related to achieving that objective, then the law does not transgress due process." *Baker* v. *City of Concord*, 916 F.2d 744, 755 (1st Cir. 1990).

As if this standard were not generous enough, a reviewing court must uphold the law if any rational basis conceivably exists for it, regardless of whether Congress had that particular basis in mind when it voted passage. *See FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Gilbert* v. *City of Cambridge*, 932 F.2d 51, 65 (1st Cir. 1991). Emphasizing the narrowness of judicial review in this corner of our constitutional jurisprudence, the Supreme Court has declared unhesitatingly that if a statutory scheme is "rational and not arbitrary," Congress has "absolutely no obligation" to choose the version of the scheme that a reviewing court "would find to be the fairest." *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 477 (1985).

Chary of this forbidding legal landscape, the appellant searches for more hospitable terrain. It implies that because the

Coal Act operates retroactively to impose liability on it, the statute should be subjected to some form of heightened judicial scrutiny. This sally pirouettes around a passage from *Turner Elkhorn* in which Justice Marshall wrote: "It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." 428 U.S. at 16-17. Carefully considered, the quoted passage cannot carry the cargo that Eastern piles upon it.

Legislation is retroactive when it "attaches new legal consequences to events completed before its enactment." *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1499 (1994). As applied to Eastern, the Coal Act fits within this rubric; past events -- the employment of East and the signing of various NBCWAs in the 1950s and 1960s -- acquired new legal consequences with the emergence of the new statute. For this reason, other courts of appeals have decided that the Coal Act is retroactive in pertinent part. *See, e.g., Blue Diamond*, 79 F.3d at 523; *Davon*, 75 F.3d at 1122. We agree.

Be that as it may, the Court's cases subsequent to *Turner Elkhorn* indicate that a determination of retroactivity does not alter the level of scrutiny that substantive due process analysis demands. *See Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (explaining that "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively"). Analyzing the quoted passage in *Turner Elkhorn*, the *Gray* Court noted that any due process burden was met "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730. As long as "the retroactive application of a statute is supported by a legitimate

legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.* at 729. Accordingly, we hold that heightened scrutiny is not warranted simply because the Coal Act operates retroactively and that the conventional standard -- the rational basis standard -- endures.

Rationality review yields a positive result in this case. The historic importance of coal production in the national economy cannot be gainsaid. Moreover, the nexus between labor peace and the due functioning of the mines is obvious. For the last half-century, persistent labor difficulties within the coal industry have threatened the production of a mainstream energy resource. These difficulties were often sparked by wrangling over the provision of health care benefits for retired mine workers. Viewed against this backdrop, Congress' stated objective -- to resolve these problems by ensuring that multiemployer benefit plans were in place and were adequately funded, *see* 26 U.S.C. § 9701 note -- was entirely legitimate. Consequently, the Coal Act would seem to survive rationality review.

The appellant does not attack this conclusion frontally, but essays a flanking maneuver. It asserts that the method Congress chose to resolve these incipient problems is itself irrational in that it assigns liability for retired mine workers to companies that did not contribute to the conditions which created the problems (and, hence, the need for a dramatic legislative solution). In mounting this campaign, Eastern emphasizes two related points. First, the pre-1974 NBCWAs -- the only ones that Eastern signed -- never promised lifetime health benefits to any miners in so many words. Second, Eastern effectively insulated itself from the 1974 and subsequent NBCWAs (which did explicitly promise lifetime benefits); after all, in 1966 it transferred its coal operations to a wholly-owned subsidiary,

EACC, and EACC, not Eastern, remained in the coal business, signing NBCWAs and contributing to the more recent benefit plans. Thus, Eastern's reasoning runs, EACC, not Eastern, logically should be made to bear the financial brunt of the miners' plight.

There are two gaping flaws in the fabric of Eastern's analysis. In the first place, it is not accurate to claim that only those SOs which executed NBCWAs in or after 1974 created a legitimate expectation of lifetime health benefits for miners. Congress and the Coal Commission both reviewed the historical evidence and concluded that pre-1974 signatories had made an *implicit* commitment to furnish such benefits. *See Lindsey Coal*, 90 F.3d at 694; *Blue Diamond*, 79 F.3d at 522; *Davon*, 75 F.3d at 1124-25. Since Eastern, as a signatory of the earlier NBCWAs, contributed directly to mine workers' legitimate expectations of lifetime health benefits, requiring it to pay for the realization of those expectations is hardly irrational.

Of course, the appellant is correct in insisting that the commitment distilled by Congress from the historical data was not made explicit in the text of those NBCWAs which were written before 1974. But Eastern reads too much into that omission. To be sure, such an implied commitment might not be enforceable in a civil suit *ex contractu* -- but this is a constitutional challenge, not a breach of contract case. For purposes of due process review, Congress' determination that a commitment was made need not rest upon a legally enforceable promise; it is enough that Congress' conclusions as to the existence and effects of such a commitment are rational. *See Lindsey Coal*, 90 F.3d at 694. The conclusions which Congress reached here measure up to this benchmark. They are, moreover, buttressed by circumstantial evidence, especially the substantial concessions that the coal operators exacted from the miners in

exchange for the implicit commitment to assure lifetime health benefits. A good example can be found in the 1950 labor pact. That agreement, which Eastern signed, created a welfare and retirement fund in consideration for workers' acquiescence in the automation of the mines. *See Holland*, 102 F.3d at 741.

Nor does Eastern's inability to anticipate either the precise consequences of its actions or the form those consequences would take have weight in the due process calculus.

> [I]t may be that the liability imposed by the Act . . . was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

Concrete Pipe & Prods. of Cal., Inc. v. *Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993) (citations omitted). Lack of foresight does not create constitutional infirmity.

The second hole in the appellant's argument is even more ringent. Eastern insists that the Coal Act was a bail-out of the benefit plans, pure and simple; that it did not contribute to the funding shortfalls which necessitated the bail-out; and, thus, that holding it liable under the Act is bizarre. But this is much too crabbed a view of the historical record. The crisis in retiree benefits occurred in two stages: first, the inculcation of an

expectation of lifetime health benefits; and second, the inadequacy of the initial method chosen by the parties (through negotiation, albeit with government intervention) to respond to this expectation. Both elements were necessary in order to forge the problem which Congress eventually addressed. If the expectations had not been created by Eastern and its counterparts, the need for the later plans, and eventually for the Combined Fund, would never have arisen. Thus, it is disingenuous for Eastern to focus solely on its lack of involvement in more recent benefit plans while ignoring its role in the events leading to their establishment.

We add one related note. The persistent theme that permeates the appellant's asseverational array is a professed concern about the fairness of assessing present liability for events concluded three decades ago. Leaving to one side the legal rule which directs us to disregard such concerns, *see National R.R. Passenger Corp.*, 470 U.S. at 477, it is clear that the statutory scheme actually takes some pains to shield companies like Eastern from disproportionate liability. Eastern and companies like it are third in the hierarchical order of assignment; they will never feel the statutory sting if a 1978 (or more recent) NBCWA signatory which employed a particular miner still exists, or if any other non-defunct company employed the miner for a longer period of time than they did. Moreover, the right of companies like Eastern to seek recompense from companies like EACC is statutorily preserved. Last but not least, for all the protestations of independence which Eastern makes on EACC's behalf, the fact remains that EACC returned tens of millions of dollars in dividends to Eastern during the post-1966 period. Eastern derived substantial financial emoluments from this spin-off, and it now faces financial consequences as well. The net result may not be the tidiest paragon of fairness, but the Constitution offers Eastern

no refuge.[5]

The appellant makes a last-ditch argument in support of its substantive due process claim. This argument hinges on the Supreme Court's opinion in *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330 (1935). But the last six decades have not been kind to *Alton* or to the legal principles upon which the decision rests. *Alton* belongs to an earlier, now discredited doctrinal era, and it is no longer good law.[6] We explain briefly.

A century ago, the Supreme Court indulged a much different outlook on economic legislation, carefully scrutinizing such laws to see if they infringed particular rights, especially the right to contract. *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897), illustrates the Court's approach. In striking down a state statute that effectively rewrote marine insurance on Louisiana property if the issuing company had not fully complied with Louisiana law, the Court expressed its adherence to an expansive rendition of the substantive attributes of the Due Process Clause -- a rendition which encompassed not only the individual's right to be free from "physical restraint" but also "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful

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[5] In many respects, the system currently in place is more rational than the alternative that Eastern proposes. The appellant would like us to examine only the present day, while the Coal Act bases liability on actions throughout the time frame when miners' expectations were formed. East's case is typical. He was in Eastern's employ during a 14-year period in which he developed a reasonable expectation of lifetime health benefits. In contrast, he never worked for EACC, yet Eastern's alternative would have that company assume responsibility for him. Requiring Eastern to pick up the tab strikes us as a less arbitrary step.

[6] We note, moreover, that even if *Alton* were still zoetic, it is readily distinguishable. *See Chateaugay Corp.*, 53 F.3d at 488-89 (distinguishing *Alton*).

calling . . . and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Id.* at 589 (dictum).

This philosophy matured into a holding in *Lochner* v. *New York*, 198 U.S. 45 (1905), a case in which the Court nullified a state law limiting the number of hours that a baker could work. The *Lochner* Court made manifest its willingness to strike down, in the name of substantive due process, statutes which restricted "the freedom of master and employé to contract with each other in relation to their employment." *Id.* at 64. Justice Holmes dissented, assailing the majority's attempt to read its own philosophy into the Constitution and advocating judicial deference to Congress' economic views. *See id.* at 75.

The *Lochner* tide ran strong for a time. *See, e.g.*, *Coppage* v. *Kansas*, 236 U.S. 1, 14 (1915); *Adair* v. *United States*, 208 U.S. 161, 172-75 (1908). *Alton* represents its high water mark. There, the Court invalidated the Railroad Retirement Act, a "New Deal" statute that required railroads to fund a multiemployer retirement plan whose beneficiaries included "those who within one year prior to the date of enactment were in the service of any carrier." *Alton*, 295 U.S. at 345. The Court's substantive due process analysis focused on the perceived arbitrariness of predicating benefits on a single year of service. *See id.* at 348-49.

From this point forward, the tide ebbed. Just two years after *Alton*, a resipiscent Supreme Court performed an about-face of nearly 180 degrees. In *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), the Justices upheld a state-sponsored minimum wage law for women and declared unambiguously that "[t]he Constitution does not speak of freedom of contract. It speaks of

liberty and prohibits the deprivation of liberty without due process of law . . . . [R]egulation which is reasonable in relation to its subject and adopted in the interests of the community is due process." *Id.* at 391. The Court thereafter expressly disclaimed the "*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine." *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949).

By the mid-1960s, the Court had embraced Justice Holmes' dissent in *Lochner* and made plain that "[w]hether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963). For all intents and purposes, *Lochner* was dead. *See* Laurence H. Tribe, *American Constitutional Law* §§ 8-5 to 8-7 (2d ed. 1988); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.4 (5th ed. 1995). *Alton* perished with it.[7]

Further exposition, like a delivery of coal to Newcastle, is unnecessary. For the reasons cited, we decline to adhere to *Alton* and hold instead that the Coal Act, as applied to Eastern, does not offend the substantive component of the Due Process Clause. We add only that this holding also sounds the death knell for the appellant's poorly developed equal protection argument. In cases involving rationality review, a court must apply substantially the same analysis to both substantive due process and equal protection challenges. *See Pearson* v. *Fair*, 935 F.2d

[7] To be sure, the Supreme Court has never explicitly overruled *Alton*, but the Court's comments have made clear that the case should be regarded as a dead letter. *See, e.g.*, *Gray*, 467 U.S. at 733 (refusing to "resuscitate" *Alton* and leaving little doubt as to its lack of vitality); *see also* Andrew C. Weiler, Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 Duke L.J. 1069, 1069 n.5 (1993) (positing that *Turner Elkhorn* actually overruled *Alton*).

401, 411 n.18 (1st Cir. 1991); *Montalvo-Huertas* v. *Rivera-Cruz*, 885 F.2d 971, 976 n.7 (1st Cir. 1989). Thus, we reject out of hand Eastern's claim that the Coal Act offends the Equal Protection Clause.

V. SIFTING THE EMBERS

The appellant's final argument is premised on the Takings Clause of the Fifth Amendment. The Supreme Court has warned that when a due process argument has proven unavailing, "it would be surprising indeed to discover the challenged statute nonetheless violating the Takings Clause." *Concrete Pipe*, 508 U.S. at 641 (citation and internal quotation marks omitted). There are no such surprises here.

The Takings Clause prohibits the confiscation of private property "for public use, without just compensation." U.S. Const. amend. V. The object of this clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Despite these rhetorical flourishes, claims under the Takings Clause must be approached in a practical, commonsense fashion. In particular, given the pervasiveness of the government's regulatory power, it would be foolhardy to assume "that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986).

A court considering a Takings Clause challenge must undertake a probing, fact-intensive inquiry into the overall circumstances of the case. *See Concrete Pipe*, 508 U.S. at 643; *Connolly*, 475 U.S. at 224. Although this inquiry is not

circumscribed by a predetermined checklist, the *Connolly* Court identified three factors which have "particular significance" in ascertaining the existence *vel non* of a compensable taking. *Connolly*, 475 U.S. at 225. These factors are (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with the claimant's reasonable investment-backed expectations, and (3) the nature of the governmental action. *See id.*; *see also Concrete Pipe*, 508 U.S. at 643-45. The *Connolly* and *Concrete Pipe* Courts dealt specifically with Takings Clause challenges to the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 (MPPAA). Because the Coal Act, like the MPPAA, seeks to fund a multiemployer benefit plan by imposing retroactive liability on employers who withdraw from the plan and/or the industry, we look principally to those cases for guidance.

We turn first to economic impact. Eastern mines this shaft for all it is worth (and then some), arguing that the assignment provisions of the Coal Act, if not invalidated, will subject it to an ultimate liability of roughly $100 million. Even if this figure is accurate -- and the appellees vigorously deny that it is -- "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe*, 508 U.S. at 645. Because this case does not involve the total deprivation of an asset, the focus of our inquiry into the challenged statute's economic impact must be on proportionality. *See id.* The operative question, then, is whether Eastern's liability is reasonably related to its experience with the benefit plans that eventually blended into the Combined Fund. *See Blue Diamond*, 79 F.3d at 525; *Davon*, 75 F.3d at 1127-28; *Chateaugay Corp.*, 53 F.3d at 494-95. In our opinion, the match reflects a sufficient degree of proportionality.

We believe it is highly significant that the extent of

Eastern's statutory liability depends on its links to the provision of health benefits for particular miners. The statutory scheme assigns miners to SOs based on past work experience with a given company. Thus, the scheme saddles a former employer, like Eastern, with liability only for those individuals whom it employed for a relevant (and relatively long) period of time. Furthermore, a firm like Eastern, which has been out of the coal business for over a quarter-century, will be assigned workers only when no post-1977 NBCWA signatory can be found. So viewed, Eastern's liability will be roughly proportionate to the expectation of health benefits that it created and which have been satisfied by the industry since 1950 in a series of multiemployer plans. In situations in which a different former employer either explicitly promised benefits to a particular miner or fostered a greater expectation of benefits than did Eastern (because it employed the miner for a longer period), it will bear the concomitant burden. And, because the liability for orphaned retirees is based on the number of initial assignments made to an SO, those assignments, too, will be proportional.

The fact that the Coal Act contains provisions which moderate the statutory toll is also probative of a constitutionally tolerable economic impact. *See Connolly*, 475 U.S. at 225-26. Here, in addition to the provisions already mentioned (which relieve Eastern entirely of liability whenever a company that created a greater expectation of lifetime health benefits for an individual miner can be found), the Coal Act authorizes the use of $210 million from the 1950 Pension Plan, 26 U.S.C. § 9705, and additional moneys from the Abandoned Mine Reclamation Fund, 30 U.S.C. § 1232(h) (1994), to defray the cost of furnishing health benefits to orphaned miners. These measures, together with the contribution proviso contained in Coal Act § 9706(f)(6), support a determination that the Coal Act does not effect a taking. *See Blue Diamond*, 79 F.3d at 525.

The second element of the *Connolly* analysis involves the extent to which the challenged legislation has interfered with reasonable investment-backed expectations. On this point, the appellant's argument that it could not have foreseen the specific form of intervention that a legislative solution would take distorts the proper inquiry. The Supreme Court has not required prescience but instead has dwelled on the level of regulation in a given area or industry, noting that those who conduct business in historically regulated fields "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Concrete Pipe*, 508 U.S. at 645 (citation omitted).

Since the government appropriated the mines in 1946, federal intervention in, and regulation of, the coal industry has been frequent, and the interventions often have been triggered by the issue of health benefits for retirees. Eastern cannot reasonably claim ignorance of this pattern of federal involvement, nor can it feign astonishment when a measure like the Coal Act is passed to forestall further labor unrest. Having contributed to the expectation of lifetime health benefits for miners, Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered. *See Blue Diamond*, 79 F.3d at 525-26; *Davon*, 75 F.3d at 1128-29; *Chateaugay Corp.*, 53 F.3d at 495-96.

The final element of the *Connolly* triad implicates the nature of the government action. Under applicable precedents, a taking is much more readily found when the government "physically invade[s] or permanently appropriate[s]" assets for its own use than when the claimed deprivation merely "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225; *accord Keystone Bitum. Coal Ass'n* v. *DeBenedictis*, 480 U.S.

470, 488 n.18 (1987). To present this dichotomy is to resolve it. The Coal Act, like the MPPAA, is merely a public program that readjusts economic burdens, and the funds collected are paid to a private benefit fund, not to a government entity. Consequently, cases such as *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992), are inapposite. Inasmuch as this factor, like the other two, points toward the Coal Act's constitutionality, there is no basis whatever for the appellant's claim that the statute transgresses the Takings Clause.[8]

VI. CONCLUSION

We need go no further. Because the SSA assigned the Easts to the appellant in compliance with the clear intent of Congress, expressed unambiguously in section 9706(a) of the Coal Act, the appellant's administrative law challenge is unavailing. The appellant's constitutional initiatives fare no better. The Coal Act was motivated by a legitimate legislative purpose; the assignment system which it created lies within the wide universe of rational measures that were available to Congress as vehicles for furthering that purpose; and the statutory scheme, as applied, does not impermissibly confiscate Eastern's property.

Affirmed.

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[8] We are aware that a lone district court has determined, at the preliminary injunction stage, that the Coal Act violated the Takings Clause as applied to a particular operator. *See Unity Real Estate Co.* v. *Hudson*, 889 F. Supp. 818, 835 (W.D. Pa. 1995). But this decision is not persuasively reasoned and its precedential force has been undermined severely by the Third Circuit's summary rejection of a Takings Clause challenge involving the Coal Act. *See Lindsey Coal*, 90 F.3d at 695. Finally, *Unity Real Estate*, on its facts, *see* 889 F. Supp. at 829-31, is easily distinguishable from the case at bar.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 93-12372-MLW

EASTERN ENTERPRISES,

PLAINTIFF,

V.

DONNA E. SHALALA, ET AL.,

DEFENDANTS.

JUDGMENT

WOLF, D.J.

In accordance with the Court's Memorandum and Order dated June 29, 1996, ALLOWING Defendants' Motion for Summary Judgment in the above-entitled action, it is hereby ORDERED:

Judgment for the DEFENDANTS.

By the Court,
/s/ Zita Lovett
Deputy Clerk

Date: July 8, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 93-12372-MLW

EASTERN ENTERPRISES,

PLAINTIFF,

V.

DONNA E. SHALALA, ET AL.,

DEFENDANTS.

ORDER

WOLF, D.J. June 29, 1996

On March 30, 1996, the court issued a Memorandum and Order memorializing its decision, rendered orally on February 1, 1996, denying plaintiff Eastern Enterprise's ("Eastern") motion for summary judgment on statutory grounds and third-party defendant Peabody Holding Company's ("Peabody's") Motion to Dismiss. Eastern has since filed a motion for summary judgment on its constitutional claims. The federal defendant, Shirley Chater as Commissioner of the Social Security Administration (the "SSA"), defendant United Mine Workers of America Combined Benefit Fund and its Trustees (the "Combined Fund"), and Peabody (which includes defendants Eastern Associated Coal Corp. ("EACC") and Coal Properties Corp. ("CPC")), oppose Eastern's motion. The SSA and the Combined Fund have filed

cross-motions for summary judgment on Eastern's constitutional claims.

The parties agree that there are no material facts in dispute and, therefore, that the question of the merit of Eastern's constitutional claims is ripe for resolution. Eastern in essence asserts that the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") is unconstitutional as applied to Eastern because it violates the Due Process and Takings Clauses of the United States Constitution. These arguments have been rejected by each of the several Circuits that have addressed the question of the constitutionality of the Coal Act. *See In Blue Diamond Coal Company, Blue Diamond Coal Company* v. *Secretary of Health and Human Services*, 79 F.3d 516 (6th Cir. 1996); *Davon Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir. 1996); *In re Chateaugay Corp., LTV Steel Company Inc.* v. *Shalala*, 53 F.3d 478 (2d Cir. 1995). This court finds the reasoning of those decisions to be persuasive.

Accordingly, it is hereby ORDERED that:

§ 1. Eastern's motion for summary judgment on the constitutional claims (Docket No. 93) is DENIED.

§ 2. The cross-motions for summary judgment on the constitutional claims of the Combined Fund (Docket No. 97) and of the SSA (Docket No. 101) are ALLOWED.

§ 3. Pursuant to Fed. R. Civ. P. 54(b) final judgment shall now enter for the defendants on Eastern's statutory and constitutional claims because there is no just reason for delay in the entry of final judgment and immediate appellate review of Eastern's

statutory and constitutional claims may moot or substantially narrow the third party claims.

§ 4. By agreement of the parties, claims of third party defendant Peabody are STAYED pending appellate review of Eastern's statutory and constitutional claims, except that during the pendency of the stay, Eastern and Peabody may each serve one set of requests for the production of documents and may each conduct six depositions. However, neither Peabody may file any dispositive motions with the court during the pendency of the stay.

/s/ Mark L. Wolf
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 93-12372-MLW

EASTERN ENTERPRISES,

PLAINTIFF,

V.

DONNA E. SHALALA, ET AL.,

DEFENDANTS.

MEMORANDUM AND ORDER

WOLF, D.J. March 30, 1996

The following analysis is based upon the transcript of the decision rendered orally on February 1, 1996, denying plaintiff Eastern Enterprises' motion for summary judgment and denying third-party defendant Peabody Holding Company's ("Peabody") motion to dismiss. This memorandum adds citations, revises some of the discussion and deletes certain non-essential matters.

The transcript of the February 1, 1996 hearing is being prepared and may be acquired from the court reporter.

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I. Plaintiff's Motion for Summary Judgment

Plaintiff Eastern Enterprises has filed a motion for summary judgment on its complaint seeking a declaratory judgment that beneficiaries assigned to the plaintiff by the Social Security Administration, pursuant to 26 U.S.C. § 9706(a) (3), and related regulations, should have been assigned to Eastern Associated Coal Corporation ("EACC"), a former subsidiary or affiliate of plaintiff, whose stock was acquired by Peabody in 1987. This court's review is under the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*[1] As the parties recognize, the decision of the Social Security Administration is ripe for review on summary judgment.

This dispute concerns the Social Security Administration's assignment of Samuel East, a miner, to the plaintiff as a person entitled to pension benefits under the Coal Act and related regulations.[2] It is undisputed that East did not

[1] For the reasons stated in the Federal Defendant's Opposition to the Motion of Eastern Enterprises to Supplement the Record in Support of Summary Judgment on Statutory Interpretation Claims (Docket No. 63), this court's review should be addressed to the record upon which the challenged action is based. Thus, it does not now appear that the court should consider the decisions of the Social Security Administration regarding the USX/United States Steel Mining Company and Guyan Eagle Investment Company matters that the plaintiff submitted. *See* Memorandum in Support of Eastern's Motion to Supplement and Record in Support of Summary Judgment on the Statutory Interpretation Claims (Docket No. 57); Affidavit of William S. Elias II (Docket No. 58). As discussed *infra*, however, this limitation is not material because the court has read those decisions and finds they do not alter the conclusion that the plaintiff's motion for summary judgment on nonconstitutional grounds is without merit.

[2] 26 U.S.C. § 9706 *et seq.*; 20 C.F.R., Part 422.

work for any company that was a signatory to the 1978 Coal Wage Agreement or any subsequent agreement. Thus, there was no company to which he could be assigned pursuant to 26 U.S.C. § 9706(a) (1) or (2). The parties also do not dispute that prior to the effective date of the 1978 Coal Agreement, East was employed by Eastern Enterprises for a longer period of time than he was employed by any other signatory operator as defined in the Coal Act. Thus, the Social Security Administration assigned East to plaintiff pursuant to its interpretation of 26 U.S.C. § 9706(a) (3).

East's situation, in effect, is a test case. The Social Security Administration evidently intends to assign all similarly situated miners to the plaintiff. Plaintiff asserts that this group of miners is more appropriately assigned to EACC, which, it contends, was the successor to its coal operations. Plaintiff asserts that ultimately Peabody is responsible because when Peabody acquired the stock of EACC it assumed EACC's liabilities. The decision with regard to East is expected, by the normal operation of collateral estoppel, to decide the issue of the propriety of assignments to Eastern Enterprises of similarly situated miners in other disputes between Eastern Enterprises and the Social Security Administration in which the facts are not materially different than those in East's case.[3]

For the reasons stated by the Social Security Administration in its opposition to the motion for summary judgment, the court finds that the Social Security Administration

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[3] *See South Boston Allied War Veterans Council* v. *City of Boston*, 875 F.Supp. 891, 907-908 (D. Mass. 1995) (citing *Allen* v. *McCurry*, 449 U.S. 90, 96, 101 (1980); *Kowalski* v. *Gagne*, 914 F.2d 299, 302 (1st Cir. 1990)).

properly assigned liability for East to the plaintiff pursuant to 26 U.S.C. § 9706(a) (3).[4] The statute is not ambiguous. Rather, the Coal Act statute clearly manifests an intent that the Social Security Administration assign miners like East to the signatory to a pre-1978 Coal Wage agreement which employed the miner for the greatest period of time. If there is a successor to that signatory company which has assumed responsibility for such payments, the pre-1978 signatory operator has a right to bring a civil action for what is, in effect, indemnification.[5]

More specifically, § 9706(a) is not ambiguous. With regard to East, the statute clearly prescribes assignment to plaintiff. The statute's failure to provide for the assignment of East to the plaintiff's alleged successor, EACC, was neither an oversight nor an ambiguity. Because the Coal Act makes several references to successors,[6] the court infers that the omission of the term successor from § 9706(a) (3) was intended by Congress.[7]

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[4] Federal Defendant's Opposition to Eastern Enterprises' Motion for Summary Judgment on Statutory Interpretation Claims (Docket No. 48) at 16-20.

[5] *See* 26 U.S.C. § 9706(f) (6).

[6] *See* 26 U.S.C. § 9701(c) (2) (A) ("a related person shall also include a successor in interest"); 26 U.S.C. § 9706(b) (2) ("If a person becomes a successor of an assigned operator after the enactment date [of the Coal Act] . . .).

[7] *See Estate of Bell* v. *Commissioner, Internal Revenue Service*, 928 F.2d 901, 904 (9th Cir. 1991) ("Congress is presumed to act intentionally and purposely when it includes language in one section, but omits it in another); *United States* v. *Azeem*, 946 F.2d 13, 17 (2nd Cir. 1991) ("In general, congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated."); *United States* v. *Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir. 1989) ("Where Congress includes particular language in one section of

In addition, the decision not to include successors in § 9706(a) (3) is rational. It provides a comparatively simple way for the Social Security Administration to assign responsibility for a miner like East. It imposes a duty on the pre-1978 signatory operator, which is likely to be most familiar with the unique facts of its situation, to collect from anyone who may have agreed to assume its liability or is otherwise obligated to do so. Section, 9706(f) (6) makes clear that the Coal Act statute does not preempt or preclude such private rights of action. Section 9706(f) (6) expressly states that: "Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision of the Commissioner."

The Coal Act is silent with regard to who must be assigned beneficiaries if § 9706(a) (3) applies and the pre-1978 signatory operator who would otherwise be assigned the beneficiary is no longer in business. As plaintiff points out, the Social Security Administration has decided to assign such beneficiaries to the successors of pre-1978 signatory operators if such successors are now doing business. This provision, however, is of no assistance to Eastern Enterprises because it is not out of business.

If the Social Security Administration had promulgated a regulation imposing plaintiff's liability, as now defined by the Social Security Administration, on Eastern Enterprises' alleged successors, that regulation would appear to be vulnerable to

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a statute, but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in excluding the particular language.").

attack by successors, even under the deferential standard of *Chevron*.[8] *Chevron* provides that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's [administrative interpretation] is based on a permissible construction of the statute."[9] However, "[t]he judiciary is the final authority on issues of statutory interpretation and must reject administrative constructions which are contrary to clear congressional intent."[10]

Two decisions concerning this court's sentencing of Raymond J. Patriarca suggest that ambiguity, like beauty, may be in the eye of the beholder.[11] In *Patriarca*, this court found that the United States Sentencing Commission guideline at issue was ambiguous.[12] The First Circuit found that it was clear.[13] On the pertinent point, the Coal Act is to this court more clear than the Sentencing Guideline was in *Patriarca*.

If, however, the statute were to be deemed ambiguous with regard to its application to East, this court finds that the

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[8] *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984).

[9] *Id.* at 843.

[10] *Id.* at 843, n. 9.

[11] *Compare United States* v. *Patriarca*, 807 F.Supp. 165, 1889 (D. Mass. 1992) (Sentencing Guidelines are ambiguous regarding the meaning of the phrase "underlying racketeering activity" for the purpose of determining relevant conduct in a RICO case) *and United States* v. *Carrozza*, 4 F.3d 70, 79 (the application of the relevant conduct provision to the term "underlying racketeering activity" is "straightforward and unambiguous").

[12] 807 F.Supp. at 189.

[13] 4 F.3d at 79.

Social Security Administration's interpretation resulting in the assignment of East to the plaintiff, and leaving it to the plaintiff to impose liability on its alleged successors, is a reasonable construction of the statute deserving of deference under *Chevron*.[14]

The fact that the Social Security Administration has equivocated in its interpretation of the statute as it applies to Eastern Enterprises does not quality this conclusion. The Social Security Administration has now authoritatively determined that if a pre-1978 signatory operator is at present in business, it will assign beneficiaries similarly situated to East to that operator pursuant to § 9706(a) (3). This is a permissible and appropriate interpretation of the statute.

In addition, the Social Security Administration's assignment of beneficiaries in the USX/United Steel Mining Company and Guyan Eagle matters doe snot alter the analysis or result of plaintiff's motion for summary judgment. As noted earlier, see footnote 1, the USX and Guyan Eagle matters are not properly part of the record before this court for review.[15] More importantly, it appears that in those matters that assignments were made to successor companies only after the Social Security

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[14] *Chevron*, 467 U.S. at 843.

[15] The court recognizes that this observation may be inconsistent with the dicta in its decision in *Apex Construction Co.* v. *United States*, 719 F.Supp. 1144, 1147 n. 1 (D. Mass. 1989), to the effect that one possible grounds for obtaining discovery beyond the administrative record may be "discovery of the agency's contemporaneous construction of a particular term or regulation where the meaning is vague or ambiguous or where the construction used in the particular case appears inconsistent." It now appears that this court's observation, in dicta, may have been incorrect.

Administration's factual determinations that no otherwise assignable signatory operators or related persons remained in business. Thus, those cases are factually distinguishable from this case. The decisions in those cases were not made because the Social Security Administration used a different standard for making assignments.

Finally, addressing a point that was raised in plaintiff's memorandum, but not argued on February 1, 1996, this is not a case in which it is necessary to interpret an ambiguous statute to require assignment to plaintiff's alleged successor in order to avoid a grave and doubtful constitutional question.[16] First, as stated earlier, the statute is not ambiguous. If it is unconstitutional as written, the court should declare it unconstitutional. Second, at this point the statute does not appear to this court to be unconstitutional as applied to pre-1978 signatory operators, like the plaintiff in this case.[17]

In view of the foregoing, plaintiff's motion for summary judgment is hereby DENIED.

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[16] *See United States* v. *Monsanto*, 491 U.S. 600, 611 (1989) (where statutory language is truly ambiguous, "courts should construe statutes to avoid decision as to their constitutionality."); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trade Councils*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

[17] *See Davon, Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir. 1996) (rejecting constitutional challenges based on due process and takings clause claims).

II. Third Party Defendant Peabody's Motion to Dismiss

Peabody and its affiliates are third-party defendants, sued by Eastern Enterprises, which is a counterclaim-defendant with regard to allegations made by the United States mine Workers of America Combined Fund (the "UMWA Fund"). Peabody and its affiliates have moved to have Eastern's claim against them dismissed. The motion to dismiss is, however, without merit and is being denied, essentially for the reasons stated ion Eastern Enterprises' opposition memorandum.[18]

This court's jurisdiction over the third-party defendants is demonstrated by plaintiff's affidavits, which make a prima facie showing supported by specific verified facts.[19] Plaintiff's affidavits indicate that the sale of EACC to Peabody involved telephone calls to individuals in Boston, as well as meetings and negotiations held in Boston. This activity is sufficient to satisfy the Massachusetts Long Arm Statute's requirement that the cause of action arise out of the transacting of business in the Commonwealth.[20]

These actions also demonstrate that while purchasing EACC and Coal Properties Corporation, Peabody established the minimum contacts necessary to satisfy the constitutional

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[18] *See* Eastern Enterprises' Opposition to Third Party Defendants' Motion to Dismiss (Docket No. 20).

[19] Eastern Enterprises' Opposition to Third Party Defendants' Motion to Dismiss at Exh. A (Affidavit of Robert W. Weinig), Exh. B (Affidavit of Fred C. Raskin), Exh. C (Affidavit of Truman S. Casner) (Docket No. 20).

[20] *Ealing Corp.* v. *Harrods Ltd.*, 790 F.2d 978, 982-83 (1st Cir. 1986) (citing *Ross* v. *Ross*, 371 Mass. (1976)); M.G.L. ch. 223A § 3(a).

requirements of due process.[21] Requiring Peabody to appear in Massachusetts, rather than in New York, does not place an unfair burden upon the company and is more convenient for the plaintiff. In addition, maintaining the case in Massachusetts serves the interest of judicial efficiency since this court has substantially addressed the motion for declaratory judgment. Finally, it doe snot appear that the federal court in any other jurisdiction has a special interest in the substantive social policy involved that would justify transfer from this court. Considering these circumstances, it is fair to have the case proceed in Massachusetts.[22]

In its counterclaim against Eastern Enterprises, the UMWA Fund seeks a declaratory judgment rather than damages. However, this fact does not preclude the maintenance of a third-party action.[23] A third-party claim may be brought under Fed. R. Civ. P. 14(a) when the third party's liability is in some way dependent on the outcome of the main claim, or when the third-party is secondarily liable to the defendant. There is no express requirement that the main claim be for damages.[24] If the UMWA

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[21] *Id.* at 983-84.

[22] *See United Electrical, Radio and Machine Workers of America* v. *163 Pleasant Street Corp.*, 987 F.2d 39, 46 (1st Cir. 1993). This court is one of the permissible places in which this case may proceed. The question of a possible change of venue pursuant to 28 U.S.C. § 1404 is not now before the court.

[23] *See* Fed. R. Civ. 14(b) ("When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.").

[24] *See* Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1446 at 355 (1990) (citing *Monarch Life Ins. Co.* v. *Donahue*, 702 F.Supp. 1195 (D.C. Pa. 1989); *Prudential Insur. Co. of America* v. *BMC*

Fund prevails in this case, Eastern Enterprises will, as a practical matter, be liable for an amount estimated to be one hundred million dollars. Eastern Enterprises seeks in its third-party action to impose this liability on the third-party defendants. This is permissible.

Finally, Eastern Enterprises has stated a claim on which relief can be granted. For their motion to dismiss to be granted, the third-party defendants would have to show there is clearly no set of facts on which Eastern Enterprises is entitled to relief.[25] Eastern Enterprises' allegation that all liability regarding its mining operations was assumed, first by EACC and then by Peabody, when it bought the stock of EACC, is sufficient to state a claim on which relief may be granted.[26]

Accordingly, the motion to dismiss the third-party complaint is hereby DENIED.

/s/ Mark L. Wolf

UNITED STATES DISTRICT COURT

Industries, Inc., 113 F.R.D. 102, 103 (D.C.N.Y. 1986)).

[25] "In considering a motion to dismiss [under Fed. R. Civ. P. 12(b)(6)], a court must take the allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiffs." *Watterson* v. *Page*, 987 F.2d 1, 3 (1st Cir. 1993). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Miranda* v. *Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957)).

[26] At the February 1, 1996 hearing, Peabody suggested that it may have some unique legal defenses to the third-party complaint. The merits of any such defenses have neither been presented nor decided in the pending motion to dismiss.

COAL INDUSTRY RETIREE HEALTH BENEFITS ACT OF 1992, PUB. L. NO. 102-486, 106 STAT. 3037

SEC. 19142. FINDINGS AND DECLARATION OF POLICY.

(a) FINDINGS. — The Congress finds that — . . .

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

SELECTED SECTIONS OF THE UNITED STATES CODE, TITLE 26, SUBTITLE J

§ 9701 Definitions of general applicability

(a) Plans and funds. — For purposes of this chapter —

(1) UMWA Benefit Plan. —

(A) In general. — The term "UMWA Benefit Plan" means a plan —

(i) which is described in section 404(c), or a continuation thereof; and

(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

(B) 1950 UMWA Benefit Plan. — The term "1950 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is

substantially limited to individuals who retired before 1976.

(C) 1974 UMWA Benefit Plan. — The term "1974 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

(2) 1950 UMWA Pension Plan. — The term "1950 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired before 1976.

(3) 1974 UMWA Pension Plan. — The term "1974 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

(4) 1992 UMWA Benefit Plan. — The term "1992 UMWA Benefit Plan" means the plan referred to in section 9713A.

(5) Combined fund. — The term "Combined Fund" means the United Mine Workers of America Combined Benefit Fund established under section 9702.

(b) Agreements. — For purposes of this section —

(1) Coal wage agreement. — The term "coal wage agreement" means —

(A) The National Bituminous Coal Wage Agreement, or

(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

(2) Settlors. — The term "settlors" means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the "BCOA").

(3) National Bituminous Coal Wage Agreement. — The term "National Bituminous Coal Wage Agreement" means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

(c) Terms relating to operators. — For purposes of this section —

(1) Signatory operator. — The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.

(2) Related persons. —

(A) In general. — A person shall be considered to be a related person to a signatory operator if that person is —

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

(B) Time for determination. — The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

(3) 1988 agreement operator. — The term "1988 agreement operator" means —

(A) a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

(4) Last signatory operator. — The term "last signatory operator" means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

(5) Assigned operator. — The term "assigned operator" means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

(6) Operators of dependent beneficiaries. — For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the

signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

(7) Business. — For purposes of this chapter, a person shall be considered to be in business if such person conducts of derives revenue from any business activity, whether or not in the coal industry.

(d) Enactment date. — For purposes of this chapter, the term "enactment date" means the date of the enactment of this chapter.

§ 9702 Establishment of the United Mine Workers of America Combined Benefit Fund

(a) Establishment. —

(1) In general. — As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

(2) Merger of retiree benefit plans. — As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

(3) Treatment of plan. — The Combined Fund shall be —

(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

(4) Tax treatment. — For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

(b) Board of trustees. —

(1) In general. — For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

(C) two individuals designed by the United Mine Workers of America; and

(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

(2) Successor trustees. — Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees.

(3) Special rules. —

(A) BCOA. — If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

(B) Former signatories. — The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

(c) Plan year. — The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

§ 9703 Plan benefits

(a) In general. — Each eligible beneficiary of the Combined Fund shall receive —

(1) health benefits described in subsection (b), and

(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

(b) Health benefits. —

(1) In general. — The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

(2) Plan payment rates. —

(A) In general. — The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which —

(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium

payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

(B) Reductions. — The amount determined under subparagraph (A)(ii) for any plan year shall be reduced —

(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

(ii) by the amount reserved for plan administration under subsection (d).

(C) Increases. — The amount determined under subparagraph (A)(ii) shall be increased —

(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

(ii) by any carryover to the plan year from any preceding plan year which —

(I) is derived from amounts described in section 9704(e)(3)(B)(i), and

(II) the trustees elect to use to pay benefits for the current plan year, and

(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

(3) Qualified providers. — The trustees of the Combined Fund shall not enter into an agreement

under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

(4) Effective date. — Benefits shall be provided under paragraph (1) on and after February 1, 1993.

(c) Death benefits coverage. —

(1) In general. — The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

(2) Termination of coverage. — The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

(d) Reserves for administration. — The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

(e) Limitation on enrollment. — The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

(f) Eligible beneficiary. — For purposes of this subchapter, the term "eligible beneficiary" means an individual who —

(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

§ 9704 Liability of assigned operators

(a) Annual premiums. — Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums —

(1) the health benefit premium determined under subsection (b) for such plan year, plus

(2) the death benefit premium determined under subsection (c) for such plan year, plus

(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

(b) Health benefit premium. — For purposes of this chapter —

(1) In general. — The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

(2) Per beneficiary premium. — The Secretary of Health and Human Services shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of —

(A) the amount determined by dividing —

(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

(ii) the number of such individuals, plus

(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

(3) Adjustments for medicare reductions. — If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be

reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

(c) **Death benefit premium.** — The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

(d) **Unassigned beneficiaries premium.** — The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

(e) **Premium accounts; adjustments.** —

(1) **Accounts.** — The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

(2) **Allocations.** —

(A) **Administrative expenses.** — Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative

costs) from such accounts during the preceding plan year.

(B) **Interest.** — Interest shall be allocated to the account established for health benefit premiums.

(3) **Shortfalls and surpluses.** —

(A) **In general.** — Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

(B) **Exception.** — Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to —

(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703(b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

(C) **No authority for increased payments.** — Nothing in this paragraph shall be construed to allow expenditures for health care benefits for

any plan year in excess of the limit under section 9703(b)(2).

(f) Applicable percentage. — For purposes of this section —

(1) In general. — The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

(2) Annual adjustments. — In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

(g) Payment of premiums. —

(1) In general. — The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

(2) Deductibility. — Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

(h) Information. — The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Secretary of Health and Human Services information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

(i) Transition rules. —

(1) 1988 Agreement operators. —

(A) 1st year costs. — During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

(B) Deficits from merged plans. — During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

(C) Failure. — If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

(D) Premium reductions. —

(i) 1st year payments. — In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1, 1993.

(ii) Deficit payments. — In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in

connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the "evergreen clause" found in the language of the 1950 UMWA Benefit plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

(iii) Limitation. — Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

(iv) Plan years. — Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

(E) Allocations of contributions and refunds. — Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

(2) 1st plan year. — In the case of the plan year of the Combined Fund beginning February 1, 1993 —

(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

(3) Startup costs. — The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

§ 9706 Assignment of eligible beneficiaries

(a) In general. — For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which —

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which —

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

(b) Rules relating to employment and reassignment upon purchase. — For purposes of subsection (a) —

(1) Aggregation rules. —

(A) Related person. — Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

(B) Certain employment disregarded. — Employment with —

(i) a person which is (and all related persons with respect to which are) no longer in business, or

(ii) a person during a period during which such person was not a signatory to a coal wage agreement,

shall not be taken into account.

(2) Reassignment upon purchase. — If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such a successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such

assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

(c) **Identification of eligible beneficiaries.** — The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Commissioner of Social Security a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

(d) **Cooperation by other agencies and persons.** —

(1) **Cooperation**. — The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Commissioner of Social Security in providing information which will enable the Commissioner to carry out his responsibilities under this section.

(2) **Providing of information** —

(A) **In general.** — Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Commissioner of Social Security

in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Commissioner shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Commissioner, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Commissioner shall be so advised.

(B) **Limitation.** — Any information provided under subparagraph (A) shall be limited to information necessary for the Commissioner to carry out his duties under this section.

(3) **Trustees.** — The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Commissioner in furnishing, or assisting the Commissioner to obtain, any information the Commissioner needs to carry out the Commissioner's responsibilities under this section.

(e) **Notice by Commissioner.** —

(1) **Notice to fund.** — The Commissioner of Social Security shall advise the trustees of the Combined

Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

(2) Other notice. — The Commissioner of Social Security shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

(f) Reconsideration by Commissioner. —

(1) In general. — Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Commissioner of Social Security detailed information as to the work history of the beneficiary and the basis of the assignment.

(2) Review. — An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Commissioner of Social Security shall conduct such review if the Commissioner finds the operator provided evidence with the request constituting a prima facie case of error.

(3) Results of review. —

(A) Error. — If the Commissioner of Security Social determines under a review under paragraph (2) than an assignment was in error —

(i) the Commissioner shall notify the assigned operator and the trustees of the

Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

(ii) the Commissioner shall review the beneficiary's record for reassignment under subsection (a).

(B) No error. — If the Commissioner of Social Security determines under a review conducted under paragraph (2) that no error occurred, the Commissioner shall notify the assigned operator.

(4) Determinations. — Any determination by the Commissioner of Social Security under paragraph (2) or (3) shall be final.

(5) Payment pending review. — An assigned operator shall pay the premiums under section 9704 pending review by the Commissioner of Social Security or by a court under this subsection.

(6) Private actions. — Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Commissioner.

(g) Confidentiality of information. — Any person to which information is provided by the Commissioner of Social Security under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable

to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.